No. 20122

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES, to the Use of A. F. YOST,

Plaintiffs,

vs.

L. E. DIXON COMPANY, *et al.,*

Defendants.

L. E. DIXON COMPANY, a corporation,

Cross-Complainant,

vs.

VAN HARRIS, an individual doing business as HARRIS & SONS, *et al.,*

Cross-Defendants.

UNITED STATES, to the Use of PARAMOUNT TRUCK RENTAL, INC.,

Plaintiff,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *et al.,*

Defendants.

Opening Brief of Appellant, Paramount Truck Rental, Inc. Re Attorneys' Fees.

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I.

STATEMENT OF PLEADINGS AND FACTS RE JURISDICTION.

This is an action under the Miller Act, 40 United States Code, Section 270a, 49 Statutes 793 (1935), *et seq.,* over which the District Court had jurisdiction and, the Judgment of which is reviewable on appeal to this court pursuant to 28 United States Code, Section 1291, 65 Statutes 726 (1951).

II.

STATEMENT OF CASE.

By its Order Amending or Clarifying Pre-Trial Conference Order [Clk. Tr. p. 104] the Court below placed in issue the question of whether use plaintiff, Paramount Truck Rental, Inc. (hereafter Paramount), was entitled to recover reasonable attorneys' fees along with its general damages, if it secured judgment under the Miller Act. At the trial, Paramount adduced ample evidence from which the court could have determined what would constitute a reasonable attorneys' fees in this case. [Rep. Tr. Vol. 1, pp. 116-122.]

However, the court subsequently held that although Paramount secured judgment in its favor under the Miller Act, it was not entitled to recover reasonable attorneys' fees thereunder. The specific holding of the Court below is as follows [Memo. Op., Clk. Tr. p. 162 at 168]:

> "With respect to the contention of Use Plaintiff, Paramount, that it is entitled to recover reasonable attorneys' fees herein from Dixon, the court concludes that such item is not recoverable. The law of the State of California, except where provided by State statute or agreement between the parties, does not permit the recovery of attorneys' fees. Here, there is no applicable statute and no agreement between the parties for attorneys' fees."

Paramount, believing this decision to be patently erroneous, has appealed therefrom [Notice of Cross Appeal, Clk. Tr. p. 182.]

III.
SPECIFICATION OF ERRORS.

Appellant has filed with this honorable court a Statement of Point intended to be relied upon appeal, to wit:

> "The District Court erred in finding that Paramount Truck Rental, Inc. is not entitled to recover reasonable attorneys' fees herein from Fidelity and Deposit Company of Maryland and L. E. Dixon Company."

IV.
ARGUMENT.

A. Under the Miller Act a Prevailing Use Plaintiff Is Entitled to Recover Reasonable Attorneys' Fees.

Although some courts apparently have held that the question of whether or not a prevailing use plaintiff is entitled to recover attorneys' fees under the Miller Act is to be determined by the law of the State in which the contract is to be performed, Paramount respectfully submits that the better view is that the Miller Act itself provides for and requires the award of attorneys' fees in behalf of a prevailing use plaintiff.

District Judge Dimond in *United States v. Breeden,* 110 F. Supp. 713 (D.C. Alaska 1953) so held, cogently reasoning as follows:

> "The several defendants . . . object to the allowance of any attorneys' fees whatever in these cases upon the ground that the Miller Act does not envisage or provide for or allow the imposition of attorneys' fees upon the sureties in payment bonds, . . .

"We must first consider the precise language of the Miller Act in this respect, which is that the payment bond is given 'for the protection of all persons supplying labor and material in the prosecution of work provided for in said contract for the use of each such person.' No specific limitation has been found in this Act or in any other federal law which forbids the allowance of attorneys' fees as part of costs for the persons who are obliged to bring suit on surety company's bonds. The text of the law would indicate it must have been the purpose of Congress to protect *all persons* supplying labor and material in the prosecution of work on such contracts. *Surely, the Congress cannot have contemplated that the persons supplying such labor and material should be obliged, in the event of the default of the contractors, to pay to their own attorneys without recompense a substantial portion of the amounts actually due them for the labor and materials supplied to the contractors. Such a rule would penalize the suppliers to the advantage of the sureties on the contractors' bonds. The protection demanded by the law is full protection to the suppliers and not partial protection, as would be the case if the attorneys' fees of the suppliers who are obliged to bring suit, could not be taxed as a part of the costs.*" (110 F. Supp. at 715, Emphasis supplied.)

Likewise, District Judge Hunter in *United States v. Fidelity and Deposit Co. of Maryland,* 144 F. Supp. 322 (W.D. La. 1956) held that:

"[T]he question as to whether or not such attorneys' fees can be collected under the Miller Act

> in this suit must be determined by the federal law. . . . [*W*]*e think that under the Miller Act, they* [*the use plaintiffs*] *are entitled to recover* not only the fair rental value of the equipment but also *the expense to them of recouping it* in cases where the recoupment is from the contractor and was made necessary by his action in retaining it." (144 F. Supp. at 329, emphasis supplied.) And the court hence awarded attorneys' fees to the use plaintiff without in any way seeking to determine or ascertain whether Louisiana law sanctioned the award thereof.

It is submitted that this court has not yet passed upon the question of whether or not attorneys' fees may be awarded to a prevailing use plaintiff under the Miller Act, whether or not State law would sanction same. All the court holds in *Sam Macri & Sons, Inc. v. U.S.A.,* 313 F.2d 119 (9th Cir. 1963) is simply that an Alaska statute permitted an award of attorney's fees to a successful use plaintiff in a Miller Act case, without considering whether such fees may be awarded under the Miller Act itself to a prevailing use plaintiff in the absence of a state statute authorizing the award thereof. Moreover, this court has held on a number of occasions that federal law must be applied in the interpretation of Miller Act cases. See *Continental Casualty Co. v. Shaeffer,* 173 F. 2d 5 (9th Cir. 1949); *Liebman v. California Electric Supply Co.,* 153 F. 2d 350 (9th Cir. 1946).

B. If the Court Determines That State Law Applies, Attorneys' Fees Must Be Awarded to the Use Plaintiff Herein Under California Law.

Assuming, but without conceding, that in order to award attorneys' fees to a prevailing use plaintiff under the Miller Act it is necessary to look to State law, applicable State law requires the award of such fees in this case. Both parties agrees that the applicable State law in this case would be that of California.

California Government Code, Section 4200 provides:

> "Every person to whom is awarded a contract involving an expenditure in excess of Two Thousand Five Hundred ($2,500) Dollars for the improvement, erection or construction of any building, road, bridge or other structure, excavating, or other mechanical work for the State, or for any political subdivision or agency of the State shall, before entering upon the performance of the work, file a good and sufficient bond with the officer or body by whom the contract was awarded."

Section 4204 provides in part:

> "To be approved, the contractors' bond shall provide that if the person or his subcontractors, fail to pay for any materials, provisions, provender, or other supplies, or teams, used in, upon, for or about the performance of the work contracted to be done . . . that the surety or sureties will pay for the same in an amount not exceeding the sums specified in the bond, *and also, in case suit is brought upon the bond, a reasonable attorneys' fee to be fixed by the court. . . .*" (Emphasis supplied.)

And Section 4207 of said Code provides in part:

> ". . . Upon the trial of the action, the court *shall award to the prevailing party a reasonable attorney's fee,* to be taxed as costs, and to be included in the judgment therein rendered." (Emphasis supplied.)

The Trial Judge herein apparently takes the position that unless there is a specific California statute authorizing the award of atorneys' fees *in a Miller Act* case, then such attorneys' fees may not be awarded.*

It is respectfully submitted that the view of the court below is much too narrow and restricted in light of the admitted remedial aspects of the Miller Act which requires it to be liberally construed. See *e.g.,*

United States v. Carter, 353 U.S. 210, 1 L. Ed. 2d 776 (1957);

United States v. Kelley, 327 F. 2d 590 (9th Cir. 1964);

McWharters and Bartlett v. United States, 272 F. 2d 291 (10th Cir. 1959);

If a resort must be made to State law, the correct analysis thereof, is set forth in *United States v. Reliance Ins. Co. of Philadelphia, Pa.,* 227 F. Supp. 939 (D. Mont. 1964). There, Judge East reasoned as follows:

> "Of course, the jurisdiction of this court in these proceedings is based solely upon the Act of Con-

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*This also was the basis of the opinion Judge Friedman in the case of *B. C. Richter Contracting Co., Inc. v. Continental Gas Co.,* 230 A.C.A. 540 at 554 and following. (1964) in a case involving a claim for attorneys' fees under the Capehart Act, 42 U.S.C. Section 1594, 69 Stat. 651 (1955) as amended 73 Stat. 323 (1959), concerning the construction of rental housing for military personnel and their families.

gress involved. *Therefore, we cannot directly deal with applicable remedial acts of the Legislature of Montana for Montana courts,* if any there may be, *but instead we must look to such remedial acts for guidance as to the legislative announcement of the public policy of the State.*

"Sections 6-401 through 6-404 R.C.M. 1947 relate to public works contractors' bonds *and are the Montana equivalents of the Miller Act, and therefore must be deemed to be the legislative-announced public policy of that State* as to court remedies in favor of suppliers and materialmen to general contractors engaged in public works and available to persons suing for and making recovery upon surety bonds furnished and supplied in compliance with the legislation.

"Sections 6-404, supra, provides, *inter alia:* 'In any suit or action brought against any such surety or sureties by any such person or corporation . . . the prevailing party shall be entitled to recover . . . attorneys' fees and such sums as the court shall adjudge reasonable.'

"Since the rule of state law applicability applies, this court must employ the public policy of the State of Montana, as announced in the provisions of Section 6-404, as the remedial adjunct to the Miller Act.

"Accordingly, I hold that the prevailing use plaintiff herein is entitled to recover as compensation for his attorneys such sum as the court shall adjudge reasonable for the institution and prosecution of these proceedings." (Emphasis supplied.)

In accord is the recent decision by Chief Judge Carswell in *United States v. Smith Engineering & Construction Co.,* 240 F. Supp. 189 (N.D. Fla. 1965) where the prevailing Miller Act use plaintiff was awarded attorneys' fees under a Florida statute which (1) was enacted *subsequent* to the signing of the contract therein involved (2) and which was specifically made applicable only to payment bond "written by the insurer under the laws of Florida." In rejecting the bonding company's argument that the bond in question was written to comply with the Miller Act and not the laws of Florida, the court stated that the "Florida statute is not to be construed so narrowly" and that "Its impact is not limited to bonds required by the State of Florida." (240 F. Supp. at 192.)

It likewise would appear that this honorable court in the *Macri* case (*supra* 313 F. 2d 119) itself adopted Judge East's philosophy that the State statute need not specifically authorize the award of attorneys' fees to a successful use plaintiff in a Miller Act case so long as the *public policy* of the State indicates the propriety of the award of such fees. In an article by Hume, "What Law Determines Liability of a Miller Act Surety for Attorney's Fees?", 1965 Ins. Counsel J. 134 at 141 (1965) the author notes that the sections of the Alaska code relied on by this honorable court in *Macri (i.e.,* Sections 55-11-51 and 55-11-52 A.C.L.A.) "simply provide that a *State court* of Alaska may in its discretion award attorney's fees as part of the 'costs' *in a suit in a State court.*" (Emphasis supplied.)

Thus, technically, since the *Macri* action was brought in a *federal* court, it would appear clear that the Alaska statutes relied on by this court to authorize the award

of attorney's fees in a Miller Act action did not specifically authorize the award thereof but, rather, merely indicated, as so clearly do the California statutes, that the public policy of Alaska sanctioned the award of attorneys' fees to the successful use plaintiff in the Miller Act action.

Likewise, the Texas statute relied upon by Circuit Judge Reeves as authorizing the award of attorney's fees to a successful use plaintiff in a Miller Act action in the case of *United States v. Texas Construction Co.*, 237 F. 2d 705 (5th Cir. 1955) has been interpreted by a Texas State appellate court to apply only to state claims and causes of actions and not to claims based on a federal statute, *Thompson v. H. Louw Co.*, 237 S.W. 2d 662 (Tex. Cir. Ct. App. 1951). Thus, the Fifth Circuit too must have reasoned that it is the policy of a state statute, rather than its literal applicability, which justified the award of attorney's fees to a prevailing Miller Act use plaintiff.

V.
CONCLUSION.

It is respectfully submitted that the court below erred in determining that it is not permitted either under the Miller Act itself or under California law to award attorney's fees to Paramount, the prevailing use plaintiff herein. This honorable court should therefore reverse that portion of the trial court's judgment so holding and remand the case for an award to Paramount of reasonable attorney's fees incurred in the trial of this action and on the appeal and cross-appeal pending before this court.

GREENBERG & GLUSKER,
By RICHARD H. FLOUM,
Attorneys for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD H. FLOUM